local exchange market . . . is open to competition."[985] Several other BOCs, however, contend that the relevant inquiry is limited to the effect of BOC entry on competition in the long distance marketplace.[986] It is clear from the variety of standards proposed that there is substantial disagreement among the parties about the scope and meaning of this critical requirement in section 271.

383. As discussed below, we believe that section 271 grants the Commission broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region, interLATA market is consistent with the public interest. Before making a determination of whether the grant of a particular section 271 application is consistent with the public interest, we are required to consult with the Attorney General, and to give substantial weight to the Attorney General's evaluation.[987] The Commission, therefore, must give substantial weight to the Department of Justice's recommendation concerning what factors we should consider when determining whether the public interest criterion is satisfied, including the standard that the Department of Justice urges us to use in evaluating such factors, its analysis of the evidence going to that issue, and its conclusion on whether authorization should be granted. Section 271, however, expressly provides that the Commission should not give "any preclusive effect" to the Department of Justice's evaluation.[988] Accordingly, section 271 ultimately obligates the Commission to decide which factors are relevant to our public interest inquiry, how to balance these factors, and whether BOC entry into a particular in-region, interLATA market is consistent with the public interest. In short, the Commission will determine, based upon the record before it, whether the statutory requirement in section 271(d)(3)(C) is met.

384. The Communications Act is replete with provisions requiring the Commission, in fulfilling its statutory obligation to regulate interstate and foreign communications by wire and radio, to assess whether particular actions are consistent with the public interest, convenience, and necessity.[989] Courts have long held that the Commission has broad

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[985] *See* Ameritech Reply Comments at 28 ("The DOJ agrees with Ameritech that the 1996 Act does not 'requir[e] any specific level of local competition' as a precondition to BOC entry into long distance, and that the proper 'public interest' standard for approval of this Application is whether the local exchange market in Michigan is open to competition.") (citing Department of Justice Evaluation at 29-31).

[986] BellSouth/SBC Comments at 10 (the public interest inquiry must focus on whether Ameritech's interLATA entry will, on balance, enhance or hinder long distance competition).

[987] 47 U.S.C. § 271(d)(2)(A).

[988] *Id.*

[989] *See, e.g.*, 47 U.S.C. § 214(a) (requiring the Commission to assess whether the construction or extension of a line is consistent with the public interest); *id.* § 303 (generally requiring the Commission to undertake various actions to regulate the broadcast industry as "the public convenience, interest, or necessity requires"); *id.*

discretion in undertaking such public interest analyses.[990] For example, in *Washington Utilities and Transportation Commission v. FCC*, the United States Court of Appeals for the Ninth Circuit, in addressing the public interest standard under section 214, stated that "this broad standard is to be interpreted in light of the Commission's sweeping mandate to regulate" pursuant to the underlying purposes of the Communications Act as stated in section 151, and that the Commission's "authority is stated broadly to avoid the need for repeated congressional review and revision of the Commission's authority to meet the needs of a dynamic, rapidly changing industry."[991]

385. The legislative history of the public interest requirement in section 271 indicates that Congress intended the Commission, in evaluating section 271 applications, to perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications Act.[992] We also conclude that Congress granted the Commission broad discretion under the public interest requirement in section 271 to consider factors relevant to the achievement of the goals and objectives of

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§ 309(a) (requiring the Commission to assess whether the public interest, convenience, and necessity will be served by granting an application for a broadcast license); *id.* § 310(d) (prohibiting the Commission from authorizing the transfer or assignment of a broadcast construction permit or license unless the transfer or assignment is consistent with the public interest, convenience, and necessity).

[990] *See, e.g., FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953) ("The statutory [public interest] standard no doubt leaves wide discretion and calls for imaginative interpretation."); *Washington Utilities and Transp. Comm'n v. FCC*, 513 F.2d 1142, 1157 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); *Network Project v. FCC*, 511 F.2d 786, 793 (D.C. Cir. 1975); *Western Union Div. Commercial Tel. Union, Am. Fed. of Labor v. United States*, 87 F. Supp. 324, 335 (D.D.C.), *aff'd*, 338 U.S. 864 (1949) (stating that "[t]he standard 'public convenience and necessity' is to be construed as to secure for the public the broad aims of the Communications Act."). *See generally FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981) (holding that the "public interest" standard under the Communications Act gives the Commission authority to consider a broad range of factors).

[991] *See Washington Util. and Transp. Comm'n*, 513 F.2d at 1157 (citing *National Assoc'n of Theatre Owners v. FCC*, 420 F.2d 194, 199 (D.C. Cir. 1969) (noting that "[r]egulatory practices and policies that will serve the 'public interest' today may be quite different from those that were adequate to that purpose in 1910, 1927, or 1934, or that may further the public interest in the future.")).

[992] *See* S. Rep. No. 23, 104th Cong., 1st Sess. 44 (1995) ("The public interest, convenience and necessity standard is the bedrock of the 1934 Act, and the Committee does not change that underlying premise through the amendments contained in this bill."). The Senate report also states that, "in order to prevent abuse of [the public interest] standard, the Committee has required the application of greater scrutiny to the FCC's decision to invoke that standard as a basis for approving or denying an application by a Bell operating company to provide interLATA services." *Id.* Although the Senate Committee appears, at one time, to have intended to require courts to apply greater scrutiny to Commission decisions approving or denying section 271 applications that are based on the public interest standard, ultimately no such requirement was incorporated into the statute.

the 1996 Act.[993] Moreover, requiring petitioning BOCs to satisfy the public interest standard prior to obtaining in-region, interLATA authority demonstrates, in our view, that Congress did not repeal the MFJ in order to allow checklist compliance alone to be sufficient to obtain in-region, interLATA authority. In section 271, Congress granted the Commission the authority to exercise its expert judgment as to relevant issues in determining whether BOC entry into a particular in-region, interLATA market is consistent with the public interest. We believe that such an inquiry should focus on the status of market-opening measures in the relevant local exchange market.[994] In so doing, the Commission may not, of course, "limit or extend the terms used in the competitive checklist."[995]

386. We reject the view that our responsibility to evaluate public interest concerns is limited narrowly to assessing whether BOC entry would enhance competition in the long distance market. We believe that our inquiry must be a broader one. The overriding goals of the 1996 Act are to open all telecommunications markets to competition by removing operational, economic, and legal barriers to entry, and, ultimately, to replace government regulation of telecommunications markets with the discipline of the market.[996] In order to promote competition in the local exchange and exchange access markets in all states, Congress required incumbent LECs, including the BOCs, to provide access to their networks in a manner that allows new entrants to enter local telecommunications markets through a variety of methods.[997] In adopting section 271, Congress mandated, in effect, that the Commission not lift the restrictions imposed by the MFJ on BOC provision of in-region, interLATA services, until the Commission is satisfied on the basis of an adequate factual record that the

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[993] *See WNCN Listeners Guild*, 450 U.S. at 593 ("the public-interest standard . . . [is] 'a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.'") (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)); *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 216 (1943) (the "[public interest] requirement is to be interpreted by its context"); *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669 (1976).

[994] We note that the Commission's public interest analysis is not confined solely to a consideration of traditional antitrust issues.

[995] 47 U.S.C. § 271(d)(4).

[996] *See* Joint Explanatory Statement at 1.

[997] As previously noted, these methods include: (1) construction of networks and interconnection with incumbent LECs; (2) use of unbundled network elements obtained from incumbent LECs; (3) resale of the retail services of the incumbent LEC purchased at wholesale rates; and (4) any combination of the foregoing three methods of entry.

BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition.[998]

387. In providing new entrants multiple avenues for entry into local telecommunications markets, Congress recognized that new entrants will adopt different entry strategies that rely to varying degrees on the facilities and services of the incumbent, and that such strategies are likely to evolve over time.[999] Moreover, Congress did not explicitly or implicitly express a preference for one particular entry strategy, but rather sought to ensure that all procompetitive entry strategies are available.[1000] Our public interest analysis of a section 271 application, consequently, must include an assessment of whether all procompetitive entry strategies are available to new entrants.

388. In addition, our public interest analysis will include an assessment of the effect of BOC entry on competition in the long distance market. We believe that BOC entry into that market could further long distance competition and benefit consumers.[1001] As we have previously observed, "the entry of the BOC interLATA affiliates into the provision of interLATA services has the potential to increase price competition and lead to innovative new services and marketing efficiencies."[1002] Section 271, however, embodies a congressional determination that, in order for this potential to become a reality, local telecommunications markets must first be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market. Only then is the other congressional intention of creating an incentive or reward for opening the local exchange market met.

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[998] Congress did, however, lift certain, other restrictions imposed on the BOCs by the MFJ immediately upon enactment of the 1996 Act. *See, e.g.*, 47 U.S.C. § 271(b) (authorizing the BOCs to provide interLATA services originating outside their in-region states and incidental interLATA services originating in any state after the date of enactment of the 1996 Act).

[999] *See, e.g.*, Joint Explanatory Statement at 148 ("This conference agreement recognizes that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant. Some facilities and capabilities (*e.g.*, central office switching) will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251.").

[1000] *See supra* note 997.

[1001] *See* Department of Justice Evaluation of SBC Oklahoma Application at 3-4 ("InterLATA markets remain highly concentrated and imperfectly competitive . . . and it is reasonable to conclude that additional entry, particularly by firms with the competitive assets of the BOCs, is likely to provide additional competitive benefits.").

[1002] *LEC Classification Order*, FCC 97-142 at para. 92.

389. In making our public interest assessment, we cannot conclude that compliance with the checklist alone is sufficient to open a BOC's local telecommunications markets to competition. If we were to adopt such a conclusion, BOC entry into the in-region interLATA services market would always be consistent with the public interest requirement whenever a BOC has implemented the competitive checklist. Such an approach would effectively read the public interest requirement out of the statute, contrary to the plain language of the section 271, basic principles of statutory construction, and sound public policy. Section 271(d)(3) provides that the Commission "shall not approve [a BOC application to provide in-region, interLATA services] . . . unless it finds that -- (A) the petitioning [BOC] has . . . fully implemented the competitive checklist . . . ; *and* (C) the requested authorization is consistent with the public interest, convenience, and necessity."[1003] Thus, the text of the statute clearly establishes the public interest requirement as a separate, independent requirement for entry. In addition, Congress specifically rejected an amendment that would have stipulated that full implementation of the checklist satisfies the public interest criterion.[1004] Consequently, Congress' adoption of the public interest requirement as a separate condition for BOC entry into the in-region, interLATA market demonstrates that Congress did not believe that compliance with the checklist alone would be sufficient to justify approval under section 271.

390. Although the competitive checklist prescribes certain, minimum access and interconnection requirements necessary to open the local exchange to competition, we believe that compliance with the checklist will not necessarily assure that all barriers to entry to local telecommunications market have been eliminated, or that a BOC will continue to cooperate with new entrants after receiving in-region, interLATA authority. While BOC entry into the long distance market could have procompetitive effects, whether such benefits are sustainable will depend on whether the BOC's local telecommunications market remains open after BOC interLATA entry. Consequently, we believe that we must consider whether conditions are such that the local market will remain open as part of our public interest analysis.

391. In making a case-by-case determination of whether the public interest would be served by granting a section 271 application, we anticipate that we would examine a variety of factors in each case. We emphasize that, unlike the requirements of the competitive checklist, the presence or absence of any one factor will not dictate the outcome of our public interest inquiry. Because such factors are not preconditions to BOC entry into the in-region, interLATA market, our consideration of such factors does not "limit or extend the terms used in the competitive checklist," contrary to section 271(d)(4). Accordingly, in conducting our public interest inquiry, we will consider and balance various factors to determine if granting a

[1003] 47 U.S.C. § 271(d)(3) (emphasis added).

[1004] The Senate rejected, by a vote of 68-31, an amendment that would have added the following language to S. 652, which was the source of the public interest requirement in section 271: "Full implementation of the checklist in subsection (b)(2) shall be deemed in full satisfaction of the public interest, convenience, and necessity requirement of this subparagraph." 141 Cong. Rec. S7971, S8043 (June 8, 1995).

particular section 271 application is consistent with the public interest. For example, as we noted at the outset of this Order, it is essential to local competition that the various methods of entry contemplated by the 1996 Act be truly available. The most probative evidence that all entry strategies are available would be that new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large). We emphasize, however, that we do not construe the 1996 Act to require that a BOC lose a specific percentage of its market share, or that there be competitive entry in different regions, at different scales, or through different arrangements, before we would conclude that BOC entry is consistent with the public interest. Rather, we believe that data on the nature and extent of actual local competition, as described above, are relevant, but not decisive, to our public interest inquiry, and should be provided. If such data are not in the record or available for official notice, we would be forced to conclude that the BOC is not facing local competition. Our inquiry then would necessarily focus on whether the lack of competitive entry is due to the BOC's failure to cooperate in opening its network to competitors, the existence of barriers to entry, the business decisions of potential entrants, or some other reason.

392. Evidence that the lack of broad-based competition is not the result of a BOC's failure to cooperate in opening local markets could include a showing by the BOC that it is ready, willing, and able to provide each type of interconnection arrangement on a commercial scale throughout the state if requested. We believe that the existence of certain other factors conducive to efficient, competitive entry would indicate that local telecommunications markets are and will remain open to competition, even if broad-based competitive entry has not yet occurred. We would, for example, be interested in evidence that a BOC is making available, pursuant to contract or otherwise, any individual interconnection arrangement, service, or network element provided under any interconnection agreement to any other requesting telecommunications carrier upon the same rates, terms, and conditions as those provided in the agreement. Such evidence would demonstrate that competitive alternatives can flourish rapidly throughout a state, by assuring that new entrants can enter the market quickly without having to engage in lengthy and contentious negotiations or arbitrations with the BOC.

393. In addition, evidence that a BOC has agreed to performance monitoring (including performance standards and reporting requirements) in its interconnection agreements with new entrants would be probative evidence that a BOC will continue to cooperate with new entrants, even after it is authorized to provide in-region, interLATA services. Performance monitoring serves two key purposes. First, it provides a mechanism by which to gauge a BOC's present compliance with its obligation to provide access and interconnection to new entrants in a nondiscriminatory manner. Second, performance monitoring establishes a benchmark against which new entrants and regulators can measure

performance over time to detect and correct any degradation of service once a BOC is authorized to enter the in-region, interLATA services market.

394. We would be particularly interested in whether such performance monitoring includes appropriate, self-executing enforcement mechanisms that are sufficient to ensure compliance with the established performance standards. That is, as part of our public interest inquiry, we would want to inquire whether the BOC has agreed to private and self-executing enforcement mechanisms that are automatically triggered by noncompliance with the applicable performance standard without resort to lengthy regulatory or judicial intervention. The absence of such enforcement mechanisms could significantly delay the development of local exchange competition by forcing new entrants to engage in protracted and contentious legal proceedings to enforce their contractual and statutory rights to obtain necessary inputs from the incumbent.

395. Moreover, we would be interested in knowing whether a BOC has provided new entrants with optional payment plans for the payment of non-recurring charges that would allow new entrants, upon request, to avoid having to pay such charges as a single, up-front payment. As we noted above, unreasonably high non-recurring charges could chill competition.[1005]

396. We would also want to know about state and local laws, or other legal requirements, that may constitute barriers to entry into the local telecommunications market, or that are intended to promote such entry. We would, for example, be interested in knowing whether state or local governments have imposed discriminatory or burdensome franchising fees or other requirements on new entrants. We also would want to know if states or municipalities have denied new entrants equal access to poles, ducts, conduits, or other rights of way. In addition, we would be interested in whether a state has adopted policies and programs that favor the incumbent, for example, those relating to universal service. Although we recognize that a BOC may not have the ability to eliminate such discriminatory or onerous regulatory requirements, we believe that local competition will not flourish if new entrants are burdened by such requirements.

397. Furthermore, we would be interested in evidence that a BOC applicant has engaged in discriminatory or other anticompetitive conduct, or failed to comply with state and federal telecommunications regulations.[1006] Because the success of the market opening

[1005] Revenue-neutral optional payment plans could include plans whereby the BOC recovers amounts equivalent to the non-recurring charges through installments payments or, for those items for which there are also recurring charges, through an increase in the recurring charges.

[1006] As part of our public interest analysis, we would, therefore, consider allegations, such as those discussed above, regarding Ameritech's inbound telemarketing script, Value Link Calling Plus Plans, and Winback Program. *See supra* Section VIII.

provisions of the 1996 Act depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations, evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority.

398. In the preceding paragraphs, we have identified various factors that we believe would be probative of whether a BOC's local telecommunication market is open to competition. We emphasize that this list is merely illustrative, and not exhaustive, of the factors we may consider when determining whether a BOC's local market is open to competition. We encourage interested parties, including the Department of Justice and the relevant state commission, to identify other factors that we might consider in the context of a specific application, and the weight that we should attach to the various factors, in making this assessment.

399. Moreover, as we have previously noted, we need to be confident that we can rely on the petitioning BOC to continue to comply with the requirements of section 271 after receiving authority to enter into the long distance market. A BOC could alleviate substantially these concerns by making specific commitments in its application that would ensure its continued cooperation with new entrants. A BOC could, for example, commit to comply with reporting requirements, performance standards, and appropriate, self-executing enforcement mechanisms, to the extent such requirements, standards and mechanisms are not included in the BOC's interconnection agreements.

400. In the absence of adequate commitments from a BOC, we believe that we have authority to impose such requirements as conditions on our grant of in-region, interLATA authority. We believe that at least two separate statutory provisions give us authority to impose such conditions. First, section 271 expressly contemplates that Commission approval of a section 271 application might contain "conditions." Subsection 271(d)(6), which is captioned "ENFORCEMENT OF CONDITIONS," provides that if, after approval of an application, "the Commission determines that a Bell operating company has ceased to meet any of *the conditions* required for such approval," it may take any of several actions, including requiring correction of the deficiency, suspending or revoking the approval, or imposing a penalty.[1007] We find that the term "conditions" in paragraph (6)(A) should not be read to mean simply those explicit "requirements" for approval under subsection (c). Rather, we note that, elsewhere in section 271, when reference is made to the specific requirements of

[1007] 47 U.S.C. § 271(d)(6)(A) (emphasis added).

section 271(c), the statute consistently uses the term "requirements" and not the term "conditions."[1008]

401. Second, the Commission independently derives authority for the imposition of conditions in the section 271 context from Section 303(r) of the Communications Act, which expressly grants the Commission the authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . ."[1009] Because section 271 is part of the Communications Act, the Commission's authority under section 303(r) to prescribe conditions plainly extends to section 271. Moreover, as noted, we do not read section 271 as containing any prohibitions on conditions but, rather, find express support for conditioning approval of section 271 applications in the language of section 271(d)(6)(A).

402. In sum, our public interest inquiry requires us to examine carefully a number of factors, including the nature and extent of competition in the applicant's local market, in order to determine whether that market is and will remain open to competition. The more vigorous the competition is in the BOC's local market, the greater is the assurance that the BOC is cooperating in opening its market to competition and that entry through the various methods set forth in section 251(c) of the 1996 Act is possible. In the absence of broad-based competition, however, we will carefully examine the record, and weigh the evidence before us, to determine whether the lack of such competition is the result of continuing barriers to entry, the BOC's lack of cooperation, the business decisions of new entrants, or some other reason.

X. CONCLUSION

403. For the reasons discussed above, we deny Ameritech's application for authorization under section 271 of the Act to provide in-region, interLATA services in the state of Michigan. In making this decision, however, we recognize that Ameritech has made a number of strides in fulfilling its obligation under the Telecommunications Act of 1996 to open the local exchange market to competition. Ameritech has committed considerable resources and has expended tremendous effort in implementing many of the steps necessary to receive in-region, interLATA authority. For example, although we conclude above that Ameritech has not demonstrated that it provides nondiscriminatory access to all OSS functions, we acknowledge that Ameritech has taken substantial measures to develop the electronic interfaces necessary to facilitate the use of resale services and unbundled network elements by competing carriers. We also are aware of the effort and expense associated with

[1008] *See, e.g.*, 47 U.S.C. § 271(d)(3)(A) ("the petitioning Bell operating company has met the *requirements* of subsection (c)(1) . . . ") (emphasis added).

[1009] 47 U.S.C. § 303(r).

preparing the actual application on which Ameritech bases its claim for authorization, and expect that our decision will provide substantial guidance for future applications.

XI. ORDERING CLAUSES

404. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), and 271 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 154(j), 271, Ameritech Michigan's application to provide in-region interLATA service in the State of Michigan filed on May 21, 1997, IS DENIED.

405. IT IS FURTHER ORDERED that the motion to dismiss filed by the Association for Local Telecommunications Services on June 10, 1997, IS DENIED.

406. IT IS FURTHER ORDERED that the motion to strike filed by Ameritech Michigan on July 7, 1997, IS DENIED.

407. IT IS FURTHER ORDERED that the motion to strike filed by AT&T Corp. on July 15, 1997, IS DENIED.

408. IT IS FURTHER ORDERED that the joint motion to strike filed by MCI Telecommunications Corporation, et al. on July 16, 1997, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Ameritech Michigan's 271 Application for Service in Michigan
CC Docket No. 97-137
List of Commenters

1. Ameritech
2. Association for Local Telecommunication Services (ALTS)
3. AT&T Corp. (AT&T)
4. Bell Atlantic Telephone Companies (Bell Atlantic)
5. Bell Atlantic and NYNEX
6. BellSouth Corporation and SBC Communications Inc.
7. Brooks Fiber Communications (Brooks Fiber)
8. Communications Workers of America (CWA)
9. Competition Policy Institute (CPI)
10. Competitive Telecommunications Association (CompTel)
11. Governor of Michigan
12. Intermedia Communications Inc. (Intermedia)
13. KMC Telecommunications, Inc. (KMC)
14. LCI International Telecom Corp. (LCI)
15. MCI Telecommunications Corporation (MCI)
16. Michigan Attorney General Frank J. Kelley
17. Michigan Cable Telecommunications Association (MCTA)
18. Michigan Consumer Federation (MCF)
19. Michigan Public Service Commission (Michigan Commission)
20. National Association of Commissions for Women (NACW)
21. National Cable Television Association (NCTA)
22. Ohio Consumers' Counsel
23. Paging & Narrowband PCS Alliance of the Personal Communications Industry Association (PCIA)
24. Phone Michigan
25. SBC Communications Inc. (SBC)
26. Sprint Communications Company L.P. (Sprint)
27. Telecommunications Resellers Association (TRA)
28. Teleport Communications Group Inc. (TCG)
29. Time Warner Communications Holdings, Inc. (Time Warner)
30. Triangle Coalition for Science and Technology Education (Triangle)
31. Trillium Cellular Corporation (Trillium)
32. United Homeowners Association (UHA)
33. United Seniors Health Cooperative (USHC)
34. WorldCom, Inc. (MFS WorldCom)

SEPARATE STATEMENT OF CHAIRMAN REED HUNDT

Re: Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Michigan

In today's decision, we provide a detailed, comprehensive roadmap that makes clear what Bell Operating Companies (BOCs) must do in order to satisfy the open market checklist enacted by Congress in the Telecommunications Act of 1996. I applaud the work of our talented and dedicated Common Carrier Bureau, which, working within the tight time limits mandated by Congress, has drafted the clearest, most comprehensive roadmap that any pro-competition cartographer has ever produced within 90 days.

This Order describes in great detail the steps the BOCs must take to satisfy Congress' checklist. The Order reaffirms that where a Bell Operating Company has the will, there is a way. Any BOC that wishes to take the steps necessary to follow the roadmap will have the opportunity to enter the long distance market. This is the bargain Congress struck in the Telecom Act: when a BOC has reliably, practically, and fully opened its local market to competition and permanently allowed competitors fair access to the economies of scale and scope it generated during the previous monopoly era, it should be permitted to enter the long distance market.

When a BOC is supplying network elements or services to competitors, it must make available those elements and services on the same nondiscriminatory basis it provides to itself. Because incumbents characteristically use these elements in combination, incumbents must therefore offer the elements in combination to their competitors in order to meet the requirements of section 271.

The standard for evaluating the incumbents' offerings is parity, not perfection. A BOC cannot merely announce, moreover, that it is capable of selling or leasing its network services and elements. The BOC must demonstrate that it has the operations support systems actually to deliver those services and elements to competitors. The prices that a BOC charges its competitors for interconnection, unbundled elements, and resale are also extremely relevant. We believe that in order to promote efficient, competitive entry and comply with section 271, a BOC must offer its competitors prices that are set on the basis of forward-looking economic costs, using TELRIC (total element long run incremental cost) principles.

Moreover, a uniform national reading of section 271, of course, is necessary. This necessitates having a single national pricing methodology (which would generate different specific prices within states and within regions inside states), as is set forth in our Order. A uniform pricing methodology has flexibility to accommodate local issues, such as varying

costs of capital and other parameters. But the statute cannot be fairly read to permit different states to use different pricing methodologies for the purpose of compliance with section 271. Such an approach would be an insupportable reading of the statute.

Interpreting section 271 to encompass different and conflicting pricing methodologies would generate inequities among the different BOCs, in that some might enter long distance only when a pro-competition pricing methodology for unbundled elements and interconnection truly and effectively opened that BOC's local market. By contrast, other BOCs would be able to enter when their local markets were less open to new entry as a result of a state's election of a pricing methodology that was more inimical to new entry (such as a methodology that sought to recover historic cost from new entrants, instead of in some competitively neutral manner). Such a result would be bad policy as well as a bad reading of the law.

I recognize and applaud the steps that Ameritech and the state of Michigan have taken to open the local market in Michigan to competition, and I welcome the competition that BOC entry into long distance should promote in that market. It also is possible that the anticipation of BOC entry into long distance in a particular market could create a greater incentive for the long distance companies to respond by entering the local market in that state.

It should also be noted that today's roadmap plainly extends to Ameritech and the other BOCs the opportunity to enter the long distance market well before the three-year "date certain" deadline (which would have been February 1999, given the date the law was signed) that the BOCs lobbied Congress to adopt -- and which Congress in fact rejected.

Statement of Commissioner
James H. Quello

Re: *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*

Although today's Order by the Commission rejects Ameritech's application to enter the long distance market in Michigan, I am pleased that it provides Ameritech and other Bell operating companies with clear guidance on the Commission's 271 review process. It would be unreasonable, in my opinion, for this Commission to reject Ameritech's application without also providing our interpretation of many of the key elements of section 271. In addition to furnishing substantial guidance on checklist items that we found Ameritech did not meet, we have interpreted several other provisions of section 271, including the public interest test. I believe this guidance will assist BOC applicants and their competitors in understanding their rights and obligations under the pro-competitive framework established by Congress.

I commend Ameritech for its efforts to open its network to competitors. Even before Congress passed the Telecommunications Act of 1996, it had become clear that incumbent local telephone companies would not retain their monopolies forever. Ameritech understood this and responded by seeking to work reasonably with its competitors through its Customers First initiative in 1993, which would have permitted competitors to gain access to Ameritech's network. It has been my experience, both in the private sector and as a regulator, that the most successful companies try to embrace and manage change rather than resist it at every turn. Since the passage of the 1996 Act, we have seen plenty of resistance from some incumbent local carriers. I believe a progressive approach, as demonstrated by Ameritech in this application, will ultimately prove the more effective model.

Nonetheless, I fully support the Commission's decision to reject Ameritech's 271 application. The Order we adopt today identifies several important defects in Ameritech's application. If we were to grant Ameritech's application at this time, other carriers would be significantly disadvantaged in competing with Ameritech. This would be contrary to Congress' intent and unfair to Michigan's local telephone customers. I am committed to faithfully implementing our directive from Congress as described in section 271.

Some of the deficiencies in Ameritech's application appear easily fixed -- for example, Ameritech must furnish more complete data on trunk blockage rates for

calls between its network and its competitors' networks. Other shortcomings, such as the need for Ameritech to improve its operations support systems to accommodate fluctuating volumes of competitors' orders, may require more significant effort before Ameritech complies with our requirements. I am confident that none of the problems that we have identified in Ameritech's application is insurmountable, and I hope that Ameritech will take the necessary steps as soon as possible.

Finally, I wish to acknowledge the tremendous effort of the Commission's Common Carrier Bureau in this proceeding. They have taken a nearly unmanageable record and produced, under significant time pressure, a clear, well-reasoned blueprint for future 271 applications.

# # #

Separate Statement
of
Commissioner Susan Ness

Re: Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Michigan

I look forward to the day when I can cast my vote to approve a petition by a Bell company to offer in-region, interLATA service. When that day comes, the conditions for robust and enduring local competition within a state will have been created, and to the benefits of that competition will be added the introduction of a powerful new competitor in the long distance market and the elimination of a restriction that will have outlived its usefulness.

That time has not yet arrived, despite commendable progress in the State of Michigan. The state commission has been a pioneer in the development and implementation of competition policy. In the new state-federal partnership that is still being forged, Michigan remains a leader. Ameritech, too, deserves recognition for its early commitment to a pro-competitive course. The company has made enormous progress over the past few years, although the immense task of transforming the local telephone network to accommodate efficient competitive entry remains as yet unfinished. Today's decision provides valuable guidance that will help Ameritech to reach its desired goal more expeditiously.

Our decision today is faithful to the statutory scheme established by Congress. Aided by the record developed in the pre-application proceeding conducted by the Michigan commission and the detailed and insightful analysis furnished by the Department of Justice, our staff has conducted a painstaking review of a lengthy record to evaluate Ameritech's compliance with the mandatory elements of the "competitive checklist." The detailed discussion of checklist compliance in our order will enable Ameritech to focus its energies on those tasks that need to be completed before interLATA entry can be approved.

Although not strictly necessary for purposes of today's decision, our order also sets forth our initial views on the additional statutory requirement that Ameritech prove that its entry satisfies the public interest. Again, this guidance should help to pave the way for a successful application in the future. I emphasize, as does the order, that we are <u>not</u> adding to the competitive checklist. Instead, we are merely identifying various pertinent considerations that have the potential to influence, positively or negatively, our overall

conclusion as to whether Bell company entry into the interLATA market within a particular state will serve the public interest.

As our decision demonstrates, the Commission intends to apply the statutory scheme rigorously but fairly. This will not be welcome news for any company that might have hoped to secure authority for interLATA entry without really opening its local market to competition -- or that might have hoped to game the process to forestall entry indefinitely. But, for those that really intend to live up to the bargain that is embodied in the Telecommunications Act, today's decision should accelerate fulfillment of both parts of that bargain.

Separate Statement of

Commissioner Rachelle B. Chong

Re: In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan

It is a rare privilege to interpret a new piece of major legislation. As this Commission has implemented the historic Telecommunications Act of 1996 (1996 Act) over the last year and a half, our work has been arduous and controversial. In today's decision, we provide significant guidance on how we view our responsibilities pursuant to section 271 of the 1996 Act. I write separately to discuss my support of this decision, and to emphasize why the Commission is taking a strict approach on section 271 applications. Without such an approach, local networks will not be opened to competitors any time soon, competition will not be fair, and the careful statutory scheme set up by Congress will not be successfully implemented.

In today's order, we have interpreted the language of section 271 as viewed in the context of the 1996 Act as a whole. To best understand Congress' goals in section 271, some background is necessary to put Bell Operating Company (BOC) entry into long distance into perspective. In the era following the breakup of the AT&T telephone monopoly, regulators viewed the local telephone markets as natural monopolies. Most local telephone companies, including the seven BOCs and other incumbent local exchange carriers (LECs), held exclusive franchises for their service areas. The ban on BOC entry into the long distance market was based on the belief that the restriction was necessary to preserve competition in the newly competitive long distance market. If the BOCs were permitted to compete in the long distance market, it was believed they would have substantial incentives and opportunities through their bottleneck control of local exchange facilities to unduly discriminate against their long distance competitors and to cross subsidize their long distance ventures to the detriment of local telephone consumers.

The 1996 Act represents the first major comprehensive reform of the federal telecommunications statute since the 1930's. The 1996 Act radically departs from the monopoly mindset and directs the FCC to establish a new "procompetitive, deregulatory" framework[1] that, in time, allows any player to participate in any telecommunications market. In the past year and a half, the Commission has been engaged in interpreting sections 251, 252 and 253 of the 1996 Act, which, in effect, open local telecommunications markets to previously precluded competitors by removing legal impediments and inherent economic and operational advantages possessed by the incumbents. These provisions

[1] *See* H.R. Rep. No. 104-458, at 1 (1996).

require incumbent LECs, including the BOCs, to share their local networks in a manner that allows competitors to swiftly enter the local telecommunications market, without initially having to completely duplicate the incumbent LEC's entire local network.[2] Congress clearly intended that new entrants be able to compete on a fair playing field with the incumbent LECs, and thus these provisions include strict requirements to ensure that the incumbent LEC will open its local network to competition. Because the BOCs have little natural incentive to help new rivals gain a foothold in the local telephone market, the 1996 Act contains various measures to provide this incentive. The key measure is section 271.

Section 271 is the "carrot" that is offered to the BOCs to cooperate in the opening of their local network to competitors. Congress conditioned BOC entry into the in-region long distance market in a particular state on compliance with the section 271 application process. After consultation with the relevant state commission and the Department of Justice (DOJ), the Commission is required by section 271 to make various findings within a 90-day timeframe from the filing date of the BOC's application. Specifically, the Commission "shall not approve" a 271 application unless it finds that: (1) the BOC meets the requirements of Track A or Track B;[3] (2) the BOC has fully implemented the competitive checklist contained in section 271(c)(2)(B); (3) the requested authorization will be carried out in accordance with the requirements of section 272; and (4) the BOC's entry into the in-region interLATA market is "consistent with the public interest, convenience and necessity."

To date, we have had three section 271 applications filed. Ameritech's first application for Michigan was withdrawn voluntarily, and we recently rejected SBC's section 271 application for Oklahoma as not meeting Track A.[4] In this Ameritech Michigan application, we find that Ameritech meets the Track A requirement, but has not yet demonstrated full compliance with the checklist. Although we ultimately deny Ameritech's application, Ameritech's progress deserves praise. It is my view that Ameritech has made significant, good faith efforts to open its networks to competitors. In

[2] New competitors have four basic entry strategies: construction of networks and interconnection with incumbent LECs, use of unbundled network elements, resale, or any combination of the foregoing methods.

[3] Track A and B refer to the two methods by which a BOC can comply with the requirements of section 271(c)(1). Track A refers to the presence of a facilities-based competitor as provided in section 271(c)(1)(A) and Track B refers to a statement of generally available terms and conditions as provided in section 271(c)(1)(B).

[4] *Application of SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma*, CC Docket No. 97-121, FCC 97-228, Memorandum Opinion and Order (rel. June 26, 1997)(*SBC Oklahoma Order*).

addition, I want to commend the work of DOJ and the Michigan Public Service Commission for their invaluable input in this proceeding.

As we prepared this decision, many have asked the Commission to provide more guidance as to how we will evaluate compliance with section 271 in future applications. I am glad that we have made a substantial effort in this decision to provide guidance on a number of the issues in the record before us. We hope this guidance proves helpful to the BOCs, DOJ, the state commissions, and other interested parties.

For example, in this decision, we have provided some new guidance on the Track A requirements contained in section 271(c)(1)(A). We build upon our finding in *SBC Oklahoma* that the use of the term "competing provider" in that subsection suggests that there must be an actual commercial alternative to the BOC.[5] Today, we make it clear that this subsection does not require a new entrant to attain any specified level of market share or geographic penetration to be considered a "competing provider." I believe this interpretation is consistent with Congressional intent, and that any contrary interpretation would not be faithful to the plain statutory language or the legislative history.

Today's decision also reflects the Commission taking a "hard line" as to BOC provision of access to operations support system (OSS) functions that comply with sections 251(c)(3) and (c)(4), as required by the checklist. New entrants have made a strong case to me that provision of access to OSS functions is absolutely critical to their competitive entry. In this decision, we found that Ameritech did not establish by a preponderance of evidence that it is providing access to all OSS functions in a way that is nondiscriminatory. Along with the Michigan Public Service Commission and DOJ, we find that Ameritech did not provide adequate OSS performance measurements for competing carriers and for itself, which is a necessary prerequisite for us to make an informed decision on OSS compliance. In the future, it will be helpful if the BOCs file the necessary information to allow us to make a reasoned decision on this key point. Given the Commission's deep concern about this item, we expect to see detailed and verifiable evidence that this checklist item has been met.

Although we do not reach a decision on the merits of Ameritech's pricing of checklist items, we recognize that efficient pricing of checklist items is vitally important to competitive entry into the local market. Under section 271(c)(2)(B), the Commission is required to determine whether an applicant has complied with the pricing standards set forth in sections 251(c) and 252(d) of the Act. In this order, we state that such determinations by the Commission must be made in a uniform manner nationwide. I recognize that this section of today's order may be considered controversial, but this is not our intent. I agree with my colleagues that the Commission must be concerned about the

[5] *SBC Oklahoma Order* at para. 14.

uniformity of our section 271 decisions on the issue of pricing. I hope that when states are addressing pricing issues pursuant to their authority under section 252(d), they will consider our views on the appropriate pricing methodology.[6] I am very encouraged that many states to date have indicated that they have adopted or plan to adopt forward-looking economic cost approaches. I emphasize my view that the FCC and the state commissions have been given the same ultimate assignment by Congress – to introduce competition into the local market – and the best way to achieve this goal is to put aside jurisdictional disputes and work together to make this goal a reality.

In this decision, we also have provided some guidance on how we plan to approach the public interest component of section 271. I read section 271 as requiring our traditional broad public interest review, weighing the overall benefits of BOC entry versus any detriments. We set forth in this item the types of factors that we believe are relevant in determining whether the grant of an application is in the public interest. These factors include (but are not limited to) the impact on both the local and long distance markets, whether the evidence reflects that the BOC will remain in compliance with section 271, the scope of local competition in the state and efforts by the BOC to facilitate entrance by competitors into the local market. I emphasize that the factors we discuss are for illustrative purposes only and that no one factor *must* be met in order for an application to be granted. Thus, we are consistent with Congress' directive that we do not "limit or expand the checklist."

Although we have denied two section 271 applications to date, this Commission is committed to helping the BOCs achieve the "carrot" they so desire – entry into long distance. Thus, this order goes beyond those issues on which we based our denial of the application to provide additional guidance on other issues raised in the record. We expect that, as a result, a BOC should be able to make a persuasive and factually-supported showing that it has complied with both the letter and the spirit of section 271, and the 1996 Act as a whole. Thus, I remain confident that BOCs will be able to achieve long distance entry in the near future. Finally, our decision to set the bar high for section 271 applications is the right one, because the very success of the 1996 Act depends on local networks being open, in order for competition in all markets to be fair and to flourish.

[6] The Commission has set forth its views on a recommended pricing methodology in our Local Competition Order. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996), *aff'd in part and vacated in part sub nom. Iowa Utilities Board v. FCC and consolidated cases*, No. 96-3321 *et al.*, 1997 WL 403401 (8th Cir. July 18, 1997). Although the Eighth Circuit found that the Commission lacks jurisdiction to issue national pricing standards, that court notably did not address the merits of the Commission's pricing methodology.